

Litigation: The Year in Review

March 2006-February 2007



David O. Carson
Tyler Ochoa



The Copyright Office Comes to California
March 7, 2007
San Jose, California

Corwin v. Walt Disney World Co.

475 F.3d 1239 (11th Cir., Jan. 22, 2007)

**Jaffray's
original
concept
painting
titled
"Miniature
Worlds,"
1961**

**Disney's official
concept
painting of
Epcot, 1980**

Source: Post-Gazette.com. (Pittsburgh Post-Gazette)

<http://www.post-gazette.com/magazine/20000702EpcotInfo9.asp>

Live Nation Motor Sports, Inc.
v. Davis

2007 WL 79311 (N.D. Tex. 2007)



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 9/18/2004

Traicoff v. Digital Media, Inc.

439 F. Supp. 2d 872 (S.D. Ind., July 7, 2006)

Traicoff v. Digital Media, Inc.

439 F. Supp. 2d 872, 873fn. 1 (S.D. Ind. 2006)

- Traicoff granted DMI “the exclusive right, privilege and license” to use his audio recordings “and to make and/or use arrangements thereof in the manufacture and sale of parts of voices serving to reproduce the Audio in the U.S.”
- “This contract is not assignable by [DMI] and shall be binding upon the heirs, legal representatives, successor and assigns of the parties hereto.”
- DMI granted Staffing Tools a non-exclusive license to sell DMI software in exchange for 5% royalty.
- *Issue:* Could DMI sublicense exclusive rights?
 - *Gardner v. Nike*, 279 F.3d 774 (9th Cir. 2002).
 - Exclusive licenses are only assignable with the consent of the licensor.

17 U.S.C. §201(d)

(d) Transfer of Ownership. —

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

17 U.S.C. §101

...

A “transfer of copyright ownership” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

...

17 U.S.C. §101

...

”Copyright owner”, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

...

17 U.S.C. §201(d)

(d) Transfer of Ownership. —

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

17 U.S.C. § 204(a)

§ 204. Execution of transfers of copyright ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

Traicoff v. Digital Media, Inc.

439 F. Supp. 2d 872, 873 fn. 1 (S.D. Ind. 2006)

“This Entry is a matter of public record and will be made available on the court’s web site. However, this decision is based on the unique facts contained in the record, thus having no precedential value, and it is an unlikely candidate to serve as analogous authority. Additionally, the discussion contained herein is not sufficiently novel to justify commercial publication. So, the court recommends against commercial publication of this entry, either in print or electronically, and would counsel against citation of it as authoritative outside of this unusual case.”

Phillips v. Pembroke Real Estate, Inc.

459 F.3d 128 (1st Cir., Aug. 22, 2006)

Action Tapes, Inc. v. Mattson

462 F.3d. 1010 (8th Cir., Aug. 30, 2006)

- Action Tapes makes memory cards with graphic embroidery designs that enable computer-run sewing machines to stitch the embedded design on fabric and apparel.
- Defendant sewing machine supplies store rented Action Tapes' memory cards to customers.
- First sales doctrine (17 U.S.C. §109(a)): Rental of copyrighted works is ordinarily lawful, but...

17 U.S.C. §109(b)(1)(A)

...neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. ...

[added by Computer Software Rental Amendments Act of 1990]

Action Tapes, Inc. v. Mattson

Court's analysis:

- Action Tapes failed to prove it applied for registration of the *computer program* copyrights before commencing this infringement suit.
- The Copyright Office classifies computer programs as nondramatic literary works because they can be expressed in words and numbers.
- Circular 61, entitled Copyright Registration for Computer Programs, instructs those applying to register a computer program to complete application Form TX, the form prescribed for nondramatic literary works.
 - [Actually, Circular 61 says
 - Because the computer program is a literary work, literary authorship will predominate in most works, including many in which there are screen graphics. Therefore, registration will *usually* be appropriate on Form TX. If pictorial or graphic authorship predominates, registration may be made on Form PA as an audiovisual work.]

§ 408. Copyright registration in general

- (c) Administrative Classification and Optional Deposit. —
- (1) The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works. **This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.**

Action Tapes, Inc. v. Mattson

- Action Tapes identified six “visual arts” copyright registrations for the copyrights allegedly infringed.



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

FORM VA
For a Work of the Visual Arts
UNITED STATES COPYRIGHT OFFICE

VA 1-227-283



EFFECTIVE DATE OF REGISTRATION

Nov 04 2003

DO NOT WRITE ABOVE THIS LINE IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

Title of This Work ▼

NATURE OF THIS WORK ▼ See instructions

BMC SS2 Big Bird collection 1

ILLUSTRATIONS

Previous or Alternative Titles ▼

Publication as a Contribution If this work was published as a contribution to a periodical, serial or collection, give information about the collective work in which the contribution appeared Title of Collective Work ▼

If published in a periodical or serial give Volume ▼

Number ▼

Issue Date ▼

On Page ▼

NAME OF AUTHOR ▼

Archie Tapes Inc. d/b/a Great Notions

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a
"work made for hire"

☒ Yes
☐ No

Author's Nationality or Domicile
Name of Country

OR
Citizen of
Domiciled at U.S.A

Was This Author's Contribution to the Work

Anonymous ☐ Yes ☒ No
Pseudonymous ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see attached instructions

Nature of Authorship Check appropriate box(es) See instructions

☒ 1 Dimensional sculpture

☐ Map

☐ Technical drawing

☒ 2 Dimensional artwork

☐ Photograph

☐ Text

☐ Reproduction of work of art

☐ Jewelry design

☐ Architectural work

Name of Author ▼

B/N/A

Dates of Birth and Death
Year Born ▼ Year Died ▼

Was this contribution to the work a
"work made for hire"

☐ Yes

Author's Nationality or Domicile
Name of Country

OR
Citizen of

Was This Author's Contribution to the Work

Anonymous ☐ Yes ☐ No

If the answer to either of these questions is "Yes," see attached instructions

NOTE

Under the law

if "work made for hire" is generally the employer not the employee (see statute below). For any part of this work that was "made for hire" check "Yes" in the space provided give the employer (or other person for whom the work was prepared) as Author of

Action Tapes, Inc. v. Mattson

Court's analysis:

- Applicant must deposit “one copy of identifying portions of the program (first 25 and last 25 pages of source code) reproduced in a form visually perceptible without the aid of a machine or device, either on paper or in microform.”
- Action Tapes submitted no evidence that it complied with Circular 61 in applying for these registrations, and no evidence that it deposited the source codes “in a form visually perceptible without the aid of a machine or device.”
- Thus, on this record, the six allegedly infringed visual arts copyrights are not, as a matter of law, copyrights “in a computer program” within the meaning of the Rental Amendments Act.
- § 411(a) bars Action Tapes’ claims for the additional protection that the Rental Amendments Act provides.

Brilliance Audio, Inc. v. Hights Cross Communications. Inc.

474 F.3d 365 (6th Cir., Jan. 26, 2007)

17 U.S.C. §109(b)(1)(A)

Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), *and in the case of a sound recording in the musical works embodied therein*, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. ...

Brilliance Audio, Inc. v. Hights

- Do audiobooks count as “phonorecords” under §109(b)?
 - Plaintiff: Yes. Sound recordings of literary works are sound recordings.
 - Defendant: §109(b) refers to sound recordings “and ... the musical works embedded in them,” meaning that only sound recordings of musical works are covered.
- 6th Circuit: language of statute is ambiguous. Both readings are plausible.
 - Does the reference to “musical works” mean that Congress anticipated that all covered sound recordings would have musical works embedded in them?
 - Or does it simply mean that when a sound recording is a recording of the musical work, the rental right extends to the musical work as well?

Brilliance Audio, Inc. v. Hights

- Court turned to legislative history and policy rationales behind the legislation.
- The combination of legislative history, the context in which the statute was passed, and the policy rationales behind §109 and copyright law provide strong evidence that Congress intended to extend the rental right only to sound recordings of musical works.
 - While legislation was pending, exclusive focus was on the music industry.
 - No evidence Congress was thinking of audio recordings of literary works.
 - House Report noted that only musical works were considered susceptible to extensive home recording, and that it was less likely that literary works would invite the same kind of long-term, repeated enjoyment by consumers.

Brilliance Audio, Inc. v. Haight

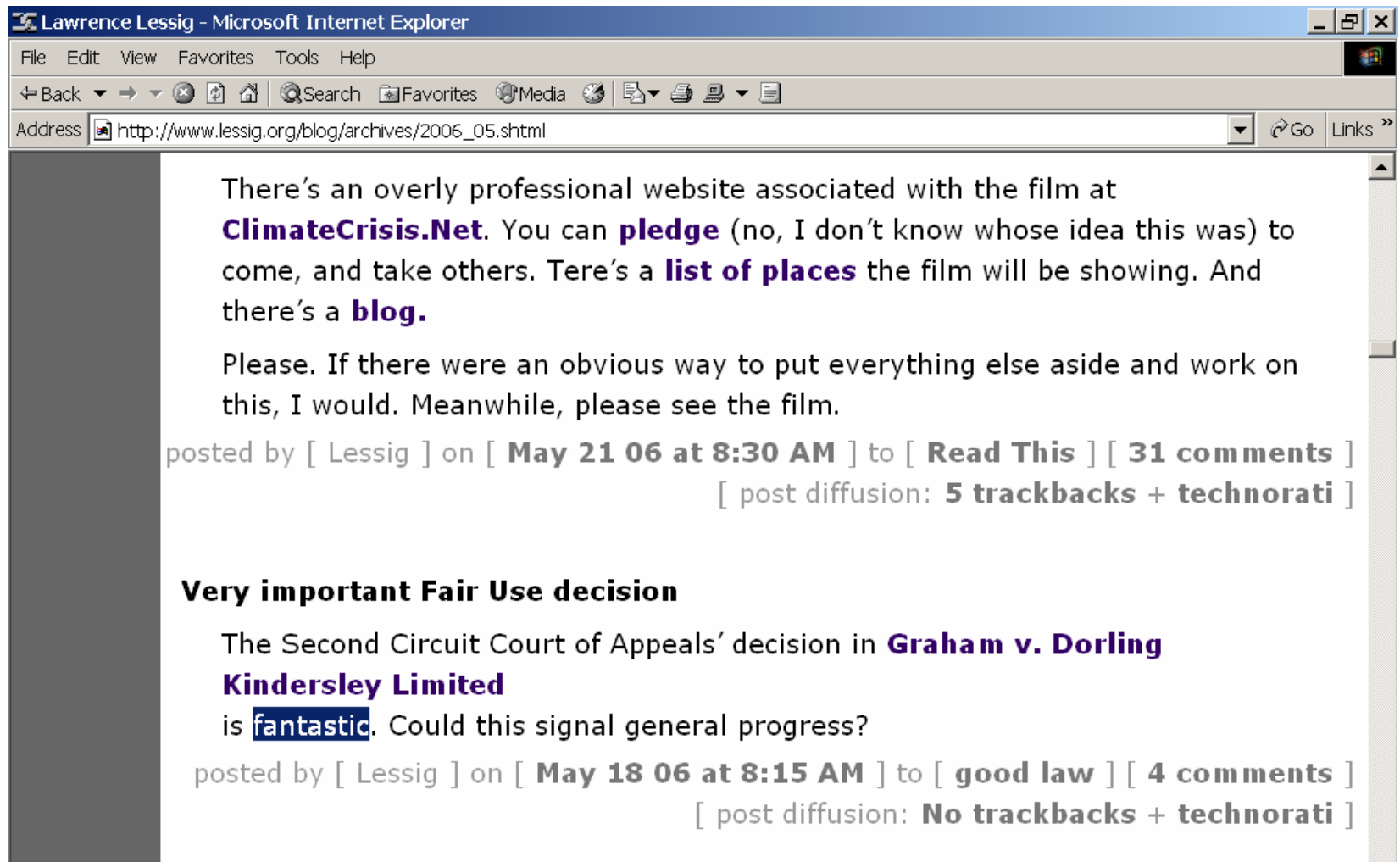
- The statute should be construed narrowly because it upsets the traditional bargain between rights of copyright owners and personal property rights of an individual who owns a particular copy, as reflected in the first sale doctrine.
 - Congress granted a rental right for phonorecords to combat rampant piracy of popular musical recordings, but had no reason to depart from the traditional bargain with respect to literary works.
- *Judge Kennedy's dissent*: The statute is not ambiguous.
 - I do not read this provision pertaining to musical works to qualify the application of 109(b) as a whole.

WallData, Inc. v. Los Angeles
County Sheriff's Dept.

447 F.3d 769 (9th Cir. 2006)

Bill Graham Archives LLC v. Dorling Kindersley Ltd.

448 F.3d 605 (2d Cir., May 9, 2006)



Bill Graham Archives v. DK

- DK used reduced images of 7 of Bill Graham's Grateful Dead posters and tickets in its book, *Grateful Dead: The Illustrated Trip*
 - Published in collaboration with Grateful Dead Productions.
- Incomplete negotiations to license the use.
- 480-page coffee-table book.
 - Timeline with over 2000 images and explanatory text.

Bill Graham Archives v. DK

- Grateful Dead Productions sought BGA's permission for DK to use the images.
- BGA: OK, if Grateful Dead Productions permits us to make CDs & DVDs from our Grateful Dead concert footage.
- DK tried to license directly.
 - But DK & BGA couldn't agree on a fee.
- DK published anyway.

Fair Use (§107)

The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. ...

Fair Use (§107)(cont'd)

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Bill Graham Archives v. DK

Fair use

- *Purpose & character of use:*
 - Most important to the court's analysis of the first factor is the 'transformative' nature of the work.”
 - The book is a biographical work; the images aren't.
 - BGA argued: Placing poster images along a time line is not transformative. The book didn't comment on each image
 - **Court:**
 - It commented on some of them (*e.g.*, Radio City)

Bill Graham Archives v. DK

“The [Dead’s] otherwise brilliant Radio City run was marred by a bizarre dispute between the band and Radio City’s management. The latter objected to promotional posters showing the inevitable skeletons flanking the venerable venue. Evidently not well versed in Grateful Dead iconography, the Radio City execs interpreted the posters as a coded (continued) message that the band thought that Radio City’s days were numbered, and they slapped the band with a million-dollar lawsuit. The misunderstanding was quickly cleared up.”

Bill Graham Archives v. DK

- *Purpose & character of use (cont'd):*
 - Even for those images the book didn't comment upon, the images still serve as historical artifacts graphically representing the fact of significant events selected for inclusion in the timeline.

Bill Graham Archives v. DK

- DK's purpose in using the copyrighted images at issue in its biography of the Grateful Dead is plainly different from the original purpose for which they were created.
 - Purpose of posters: artistic expression and promotion.
 - Purpose of use in the book: historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on *Illustrated Trip's* timeline.
- This was a transformative purpose: enhancing the biographical information in *Illustrated Trip*, a purpose separate and distinct from the original artistic and promotional purpose for which the images were created.
- This conclusion is strengthened by the manner in which DK displayed the images.
 - Reduced in size (citing *Kelly v. Arriba Soft*)
 - In the context of a collage of text and images on each page of the book.
- The images at issue are employed only to enrich the presentation of the cultural history of the Grateful Dead, not to exploit copyrighted artwork for commercial gain.

Bill Graham Archives v. DK

- Third, BGA's images constitute an inconsequential portion of *Illustrated Trip*.
 - Images take up small portions of 7 pages in a 480-page book.
- Yes, it's *commercial*, but so what?
 - Fair uses are often done for profit.
 - The book is commercial, but the images weren't exploited for commercial gain.
 - Not used in advertising or on the cover.
- First factor -- nature of the use – favors DK.

Bill Graham Archives v. DK

- *Nature of the copyrighted works:*
 - The creative nature of artistic images typically weighs in favor of the copyright holder.
 - But the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose. (citing *Campbell*).
 - Even though BGA's images are creative works, which are a core concern of copyright protection, the second factor has limited weight in our analysis because the purpose of DK's use was to emphasize the images' historical rather than creative value.

Bill Graham Archives v. DK

- *Amount and Substantiality of the Portion Used*
 - The court must examine the quantitative and qualitative aspects of the portion of the copyrighted material taken.
 - Each image was reproduced in its entirety.
 - But sometimes that's necessary in order to make a fair use.
 - The third-factor inquiry must take into account that the “the extent of permissible copying varies with the purpose and character of the use.”
 - Here, DK used historical artifacts that could document Grateful Dead concert events and provide a visual context for the accompanying text.
 - The copies were reduced in size and intermingled with text and original graphic art.
 - » This limits the visual impact of their artistic expression.

Bill Graham Archives v. DK

- We conclude that such use by DK is *tailored to further its transformative purpose* because DK's reduced size reproductions of BGA's images in their entirety displayed the minimal image size and quality necessary to ensure the reader's recognition of the images as historical artifacts of Grateful Dead concert events. *Accordingly, the third fair use factor does not weigh against fair use.*

Bill Graham Archives v. DK

- *The Effect upon the Potential Market for the Copyrighted Work*
 - The parties agree that DK's use of the images did not have an impact on BGA's primary market for the sale of the poster images.
 - Instead, we look to whether DK's unauthorized use usurps BGA's potential to develop a derivative market.
 - BGA: Interfered with the market for licensing use in books.
 - “The impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor.” *Texaco*.
 - But “we look at the impact on potential licensing revenues for ‘traditional, reasonable, or likely to be developed markets.’”

Bill Graham Archives v. DK

- DK's use of BGA's images is transformatively different from their original expressive purpose. In a case such as this, a copyright holder cannot prevent others from entering fair use markets merely “by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.”
- Since DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees.

Bill Graham Archives v. DK

“On balance, we conclude, as the district court did, that the fair use factors weigh in favor of DK’s use. For the first factor, we conclude that DK’s use of concert posters and tickets as historical artifacts of Grateful Dead performances is transformatively different from the original expressive purpose of BGA’s copyrighted images. While the second factor favors BGA because of the creative nature of the images, its weight is limited because DK did not exploit the expressive value of the images. Although BGA’s images are copied in their entirety, the third factor does not weigh against fair use because the reduced size of the images is consistent with the author’s transformative purpose. Finally, we conclude that DK’s use does not harm the market for BGA’s sale of its copyrighted artwork, and we do not find market harm based on BGA’s hypothetical loss of license revenue from DK’s transformative market.”

Blanch v. Koons

467 F.3d 244 (2d Cir., Oct. 26, 2006)

Laws v. Sony Music Entertainment, Inc.

448 F.3d 1134 (9th Cir., May 24, 2006)

Atlantic Recording Corp. v. XM Satellite Radio, Inc.

2007 WL 136186, 81 U.S.P.Q.2d 1407
(S.D.N.Y., January 19, 2007)

http://www.xmradio.com/innodemo/index.xmc?utm_source=http://www.google.com/search&utm_medium=unknown&utm_campaign=innolaunch



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Pioneer Inno is the latest in XM Satellite Radio receivers and is truly the best available portable receiver on the market today. It is cutting edge, highlighting both the unmatched programming of Live XM Satellite Radio content and the ability to save your favorite MP3 and WMA files. Also, XM Radio and Napster have teamed up to offer a great way to manage songs while providing a legal and safe way to purchase your favorite MP3. The Inno comes with a home docking station, cables, carrying case, antenna, earbuds, and XM + Napster CD.

XM Radio has also formed alliance with Samsung to offer the [Samsung Helix](#) portable receiver. Finally, we offer [Pioneer](#)

Atlantic v. XM Satellite Radio

- XM + 3 MP3 players permit subscribers to record, retain and library individually disaggregated and indexed audio files from XM broadcast performances; the Record Companies refer to this final feature as a “digital download delivery service” and this feature is the subject of this litigation.

Atlantic v. XM Satellite Radio

Record companies alleged:

- Infringement of distribution right
- Violation of §115 (unauthorized DPD)
- Infringement of reproduction right
- Violation of §112 “ephemeral recording” license
- Inducing copyright infringement
- Contributory copyright infringement
- Common-law copyright infringement (pre-1972 recordings)
- Unfair competition

XM moved to dismiss federal claims

Atlantic v. XM Satellite Radio

XM:

- Immune under Audio Home Recording Act

§ 1008. Prohibition on certain infringement actions

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a *digital audio recording device*, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings

Atlantic v. XM Satellite Radio

- Court treats Inno and other XM devices as digital audio recording devices.
 - Unlike the Diamond Rio in *RIAA v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9th Cir. 1999), XM devices can record directly from transmissions.
- But is XM a “distributor of a DARD”?
- “Issue of first impression”: there is no precedent to guide the Court’s interpretation of the AHRA where, as here, a purported distributor of a DARD primarily and simultaneously operates as a satellite radio broadcaster.

Atlantic v. XM Satellite Radio

- The protected use of a consumer to record music for noncommercial use does not contemplate the commercial recording by a broadcaster to be “leased” to the consumer for only as long as she pays the subscription fee to that broadcaster. The consumer does not own the recording; if the fee stops, so does the music.
- Plaintiffs’ claim “is that XM is acting without authorization as a commercial content delivery provider to those devices - not that XM is infringing on their copyrights by distributing a DARD.”
- As the Record Companies plainly put it, “Section 1008 does not immunize a service such as XM + MP3 that delivers permanent digital copies of sound recordings without permission from the copyright owners.”

Atlantic v. XM Satellite Radio

- By broadcasting and storing this copyrighted music on DARDs for later recording by the consumer, XM is both a broadcaster and a distributor, but is only paying to be a broadcaster.

Atlantic v. XM Satellite Radio

The Court finds that because of the unique circumstances of XM being both a broadcaster and a DARD distributor and its access to the copyrighted music results from its license to broadcast only, that the alleged conduct of XM in making that music available for consumers to record well beyond the time when broadcast, in violation of its broadcast license, is the basis of the Complaint, and being a distributor of a DARD is not. Thus the AHRA, on these facts, provides no protection to XM merely because they are distributors of a DARD.

Motion to dismiss denied.

Blueport Co. v. United States

71 Fed. Cl. 768 (June 29, 2006)

De Romero v. Institute of Puerto Rican Culture

466 F.Supp.2d 410
(D.P.R., December 15, 2006)

Google v. Copiepresse

Case No. 06/10.928/C

Tribunal de premiere instance de Bruxelles

(Feb. 13, 2007)

(Belgium)

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 **China pledges to 'put people first'**
Aljazeera.net - 50 minutes ago
China will "put people first" in its future development as the government looks to help millions of rural poor and protect the environment, Wen Jiabao, China's premier has said.
[China sets out green road to growth](#) The Age
[Chinese leader vows to tackle social problems](#) San Jose Mercury News
[Guardian Unlimited](#) - [Melbourne Herald Sun](#) - [Asia Times Online](#) - [Canoe.ca](#)
[all 481 news articles »](#)

 **Walker's World: NATO's two faces**
United Press International - 2 hours ago
By MARTIN WALKER. NEW DELHI, March 5 (UPI) -- The NATO alliance now has two faces. The European face was on display in Wiesbaden, Germany, over the weekend when German Defense Minister Franz Josef Jung suggested that the new American missile defense ...
[8 Afghans die after attack on US convoy](#) Los Angeles Times
[16 Afghans die in attack](#) News24
[Independent](#) - [Boston Globe](#) - [Reuters AlertNet](#) - [Voice of America](#)
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 **Hamas, Fatah security men trade fire over Gaza training ground**
Ha'aretz - 1 hour ago
By News Agencies. Members of a Hamas militia engaged in a daytime gunbattle with Fatah-allied security officers in Gaza City on Monday after an argument over who had control of a nearby training compound, security officials said.
[Unity Govt delayed until week's end, Palestinian PM says](#) ABC Online
[Gunbattle breaks out in Gaza City](#) International Herald Tribune
[Gulf News](#) - [People's Daily Online](#) - [Reuters AlertNet](#) - [Euronews.net](#)
[all 169 news articles »](#)

 **EU Backs Further Sanctions on Iran. Urges Firmness. Draft Says**
Bloomberg - 48 minutes ago
By James G. Neuger. March 5 (Bloomberg) -- European governments backed a tightening of sanctions on Iran, notching up the pressure after the Islamic government flouted a United Nations deadline to halt uranium enrichment, a draft EU statement said.
[I IN Nuclear Chief calls for negotiations on Iran nuclear crisis](#) Zee News

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Google v. Copiepresse

- Sept. 5: Court ordered Google to remove the content.
 - Fine: 1,000,000 Euro per day of delay in removal.
- Feb. 13: Rehearing.
 - Fine retroactively reduced to 25,000 Euro per day.
 - Prospectively: 1,000 Euro per day for delay in removal.
 - Google's News Service and the "cache" function of Google Web Search infringe Belgian copyright.
 - Google's activities amounted to material reproduction of copyrighted content not covered by any copyright exception.
 - Google to remove all content of the Copiepresse plaintiffs.
 - Within 24 hours of notification from copyright owner by email, with precise identification of the work and with proof of copyright ownership.

Google v. Copiepresse

- Reproduction & communication to public:
 - Google reproduces & communicates to the public the newspapers' copyrighted content by saving that content in a Google cache and allowing visitors to access that content on *Google's* website rather than directing visitors to the newspaper's website.
- Copyrightability
 - Although Google shows only headlines and brief excerpts, what it shows may be sufficiently original to be protected by copyright.

Google v. Copiepresse

- No applicable exceptions
 - Google does more than simply cite to the articles – they are in fact the content presented by Google
 - Google doesn't engage in criticism or review – it just presents the articles.
 - Google doesn't engage in news reporting because it adds nothing to the preexisting news reports .
- Moral rights
 - Violated right of paternity – didn't identify the author.
 - But no violation of “right of divulgation” because the articles had already been divulged to the public.
 - And no ruling on right of integrity (e.g., based on presenting the works in a different context, or in excerpts).

Google v. Copiepresse

- Implied consent?
 - The fact that the newspapers knew about Google's practice – and some even negotiated with Google – doesn't mean they consented.
 - Failure to use robots.txt did not constitute consent.

Société Plon S.A. v. Hugo

Arrêt No. 125
Cour de Cassation
(Jan. 30, 2007)
(France)

Société Civile Succession Richard Guino v. Beseder, Inc.

414 F. Supp.

2d 944 (D. Ariz., Jan. 30, 2006)

Société Civile Succession Richard Guino v. International Foundation for Anticancer Drug Discovery

460 F. Supp.

2d 1105 (D. Ariz., Nov. 3, 2006)

Christopher Phelps & Assocs. LLC v. Galloway

____ F.3d ____, 2007 WL 438806,
81 U.S.P.Q.2d 1609
(4th Cir., February 12, 2007)

Christopher Phelps & Assocs. v. Galloway

- Architectural copyright infringement
- Jury found infringement.
- Damages: \$20,000 – the fee plaintiff had charged the owner of the original house.
- Plaintiff sought injunction:
 - Prohibit completion of the house.
 - Enjoin lease or sale of the house
 - Require destruction or return of infringing plans.
- District court denied injunction
 - Plaintiff was made whole by the \$20,000 award.

Christopher Phelps & Assocs. v. Galloway

- Plaintiff: Receiving damages doesn't negate the right to injunctive relief.
- Court: Prevailing copyright owner isn't entitled to injunction.
 - *eBay v. Mercantile Exchange*.
 - Plaintiff must satisfy traditional equitable factors.
 - Irreparable injury.
 - No adequate remedy at law.
 - Balance of hardships favors plaintiff.
 - Public interest would not be disserved by injunction.
- Injunction against completion of house: moot.
- Injunction against sale or lease?

Christopher Phelps & Assocs. v. Galloway

- Award of damages/full compensation doesn't preclude injunction.
 - Damages are for past conduct.
 - Injunctive relief is forward looking, to prevent future injury.
- Would future sale or lease cause an injury for which the Copyright Act provides a remedy?
 - §106(3): exclusive right “to *distribute* copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”
 - But first sale doctrine creates an exception.
 - §109(a): Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord *lawfully made* under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.
 - Construction of the house has been subjected to remedies of the Copyright Act. Accordingly, Galloway may, after satisfying the judgment, “sell or otherwise dispose” of his house.

Christopher Phelps & Assocs. v. Galloway

- “Lawfully made”?
 - Sale prior to judgment wouldn’t be covered by first sale doctrine.
 - But having brought suit and obtained relief, plaintiff has provided the authorization that satisfies §109(a).
 - When the district court entered judgment and awarded damages, and declined to order destruction or other disposition of the house, the house became a lawfully made copy.
 - The illegal character of the copy was fully redressed by the remedies requested and granted with respect to the making of the copy.
 - Just as a converter of property obtains good title after satisfying a judgment for conversion, so does an infringer obtain good title to the physical copy after satisfying a judgment of infringement.

Christopher Phelps & Assocs. v. Galloway

- By bringing an action for infringement, plaintiff essentially sold defendant an interest in the house in exchange for the appropriate remedies under the Copyright Act.
- Not recognizing first sale rights would inappropriately expand the scope of copyright remedies in architectural cases.
 - A building usually is predominantly functional.
 - Legislative history of AWCOPA expressed expectation that injunctions will not be routinely issued against substantially completed houses whose designs violated architectural copyrights.
 - That's especially true when the building is complete and inhabited.
 - Injunction would be overbroad; encumber a great deal of property unrelated to infringement.

Christopher Phelps & Assocs. v. Galloway

- ***But:*** district court did not adequately justify its refusal to require the return or destruction of the plans.
 - Dist. Ct. simply said that since
 - Plaintiff had been made whole by the damages award, and
 - the house was already substantially constructed, and the plans were not needed to complete it,
 - There was no need to require destruction.
- Court of appeals: risk of future infringement includes possible use of plans to build another house, or publication of the plans, or other acts of copyright infringement.
- Remanded, with instructions to consider traditional equitable factors in deciding whether to require return or destruction of plans.

Clean Flicks of Colorado v. Soderbergh

433 F. Supp. 2d 1236 (D. Colo., July 6, 2006)

Clean Flicks v. Soderbergh

2005, Family Movie Act added 17 U.S.C. 110(11):

(11) the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the creation or provision of a computer program or other technology that enables such making imperceptible and that is designed and marketed to be used, at the direction of a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is created by such computer program or other technology.

Clean Flicks v. Soderbergh

- **Clearplay:** computer program that skips and mutes portions of DVDs,
- **Clean Flicks:** editing techniques used include redaction of audio content, replacing the redaction with ambient noise, “blending” of audio and visual content to provide transition of edited scenes, cropping, fogging or the use of a black bar to obscure visual content.

Clean Flicks v. Soderbergh

- “CleanFlicks first obtains an original copy of the movie from its customer or by its own purchase from an authorized retailer. It then makes a digital copy of the entire movie onto the hard drive of a computer, overcoming such technology as a digital content scrambling protection system in the acquired DVD, that is designed to prevent copying. After using software to make the edits, the company downloads from the computer an edited master copy which is then used to create a new recordable DVDR to be sold to the public, directly or indirectly through a retailer. Thus, the content of the authorized DVD has been changed and the encryption removed.”
- CleanFlicks makes direct sales and rentals to consumers online through its website requiring the purchaser to buy both the authorized and edited copies. CleanFlicks purchases an authorized copy of each edited copy it rents.

Clean Flicks v. Soderbergh

- Here, it is undisputed that all four of the counterclaim defendants distributed, by sale and rental, copies (albeit edited) of the Studios' copyrighted works and are therefore liable for infringement in the absence of any applicable defense.
- Fair use?
 - Purpose & character of use:
 - Defendants “seek to establish a public policy test that they are criticizing the objectionable content commonly found in current movies and that they are providing more socially acceptable alternatives to enable families to view the films together, without exposing children to the presumed harmful effects emanating from the objectionable content.
 - This Court is not free to determine the social value of copyrighted works. What is protected are the creator's rights to protect its creation in the form in which it was created.
- Effect of Family Movie Act?
 - The legislative history shows that the amendment was not intended to exempt actions resulting in fixed copies of altered works which the House Committee believed illegal. Thus, the appropriate branch of government had the opportunity to make the policy choice now urged and rejected it.

Clean Flicks v. Soderbergh

- Transformative use?
 - “In *Campbell*, the Supreme Court said that a use is transformative if it ‘adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.’ The counterclaim defendants add nothing new to these movies. They delete scenes and dialogue from them.
 - It is undisputed that the edits are a small percentage of most of the films copied and the use is clearly for commercial gain. There is nothing transformative about the edited copies. Therefore, the first statutory factor in the fair use defense does not support the infringers.
- Nature of the copyrighted work:
 - “The nontransformative nature of the edited copies coupled with the creative expressions of the movies weigh heavily in favor of the Studios under the second factor, the nature of the copyrighted work.”
- Amount and substantiality of the portion used in relation to the work as a whole:
 - “This factor also weighs against fair use as the amount used is substantial for the movies are copied in almost their entirety for nontransformative use.”

Clean Flicks v. Soderbergh

- The primary argument on the fair use defense is the fourth statutory factor. The counterclaim defendants contend that there is no adverse effect from their use of the movies on the value of the copyrighted work to the Studios. They suggest that the Studios benefit because they are selling more copies of their movies as a result of the editing parties' practice of maintaining a one-to-one ratio of the original and edited versions.
 - “The argument has superficial appeal but it ignores the intrinsic value of the right to control the content of the copyrighted work which is the essence of the law of copyright. Whether these films should be edited in a manner that would make them acceptable to more of the public playing them on DVD in a home environment is more than merely a matter of marketing; it is a question of what audience the copyright owner wants to reach.”
 - Fair use is predicated on a theory of an author's implied consent to reasonable and customary use. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).
 - That theory is not applicable here because the infringing parties are exploiting a market for movies that is different from what the Studios have released into and for an audience the Studios have not sought to reach.
- The fair use defense is not applicable to this case.

Clean Flicks v. Soderbergh

- But because the infringing copies of these movies are not used in a transformative manner, they are not derivative works and do not violate § 106(2).(!)
- First sale?
 - Has no applicability to the making of edits and creating the copies that are distributed to the public.
- Defendants: If you enjoin us, it will destroy our businesses.
 - Under the facts of this case, the presumed destruction of the counterclaim defendants' businesses is not a justification for denying these copyright holders – the Studios -- the right to control the reproduction and distribution of the protected work in their original form. ... Their objective ... is to stop the infringement because of its irreparable injury to the creative artistic expression in the copyrighted movies.
 - There is a public interest in providing such protection despite the injury the infringers may sustain.
 - Their business is illegitimate.
- Summary Judgment to studios on infringement of reproduction and distribution rights.
- Summary Judgment denied on derivative work right.
- Preliminary injunction granted.



CleanFlicks
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Thank you for the
memories...

As of August 31, 2006

Our sale is over and our doors are now closed.

You can contact us below with any questions

Liquidation Sale

Our doors are closed.

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CleanFlicks Media, Inc.

Motown Record Co. v. DiPietro

2007 WL 576284 (E.D.Pa., Feb. 16, 2007)

While neither the United States Supreme Court nor the Third Circuit Court of Appeals has confirmed a copyright holder's exclusive right to make the work available, the Court is convinced that 17 U.S.C. § 106 encompasses such a right based on its reading of the statute, the important decision in *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir.2001), and the opinion offered by the Register of Copyrights, Marybeth Peters, in a letter related to Congressional hearings on piracy of intellectual property on peer-to-peer networks, Letter from Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, Rep. from the 28th Dist. of Cal. (Sept. 25, 2002) (“[M]aking [a work] available for other users of [a] peer to peer network to download ... constitutes an infringement of the exclusive distribution right, as well as the production right.”).



The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540

September 25, 2002

(202) 707-8350

RE: Hearing on Piracy of Intellectual Property on Peer-to-Peer Networks

Dear Representative Berman:

In response to your request, I am responding to an assertion made in written testimony for tomorrow's Subcommittee hearing on "Piracy of Intellectual Property on Peer-to-Peer Networks" that U.S. copyright law does not give copyright owners a separate exclusive right of "making available."

This statement reflects an incorrect understanding of U.S. copyright law. While Section 106 of the U.S. Copyright Act does not specifically include anything called a "making available" right, the activities involved in making a work available are covered under the exclusive rights of reproduction, distribution, public display and/or public performance set out in Section 106. (See, e.g., *New York Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001), *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), *Marobie-FL, Inc. v. National Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167 (N.D. Ill. 1997), *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995).) Which of these rights are invoked in any given context will depend on the nature of the "making available" activity.

In the case of a peer to peer network user uploading a copyrighted work onto his or her computer, making it available for other users of the peer to peer network to download, it is simply incorrect to suggest that the person performing the download is the only person legally responsible for infringement. Making the work available in this context constitutes an infringement of the exclusive distribution right, as well of the reproduction right (where the work is uploaded without the authorization of the copyright holder). In the Ninth Circuit's decision in *A&M Records v. Napster*, the court held that "Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights." (239 F.3d 1004, 1014 (9th Cir. 2001)).

As you are aware, in implementing the new WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) in the Digital Millennium Copyright Act, Congress determined that it was not necessary to add any additional rights to Section 106 of the Copyright Act in order to implement the "making available" right

The Honorable Howard L. Berman

2

September 25, 2002

under Article 8 of the WCT.¹ Title I of the DMCA was intended to, and did, fully implement the WCT. As I stated in my testimony before the subcommittee, "In our view, [the bill] fully and adequately implements the obligations of the new WIPO treaties, without amending the law in areas where a change is not required for implementation." Since existing U.S. law already covered the activities encompassed in a making available right, "The treaties [did] not require any change in the substance of the copyright rights or exceptions in U.S. law." (H. Rep.105-551 at 15.)

Please let us know if you have any further questions or would like us to provide you with a more detailed analysis.

Sincerely,

Marybeth Peters / JP

Marybeth Peters
Register of Copyrights

The Honorable Howard L. Berman
Subcommittee on Courts, the Internet and Intellectual Property
B-351A Rayburn House Office Building
Washington, D.C. 20515

¹ Article 8 provides in pertinent part that:

"[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." WCT, Article 8 (emphasis added.)

nothing of the kind.

12:40 PM

Anonymous said...

Deference to the Register of Copyright's
opinion here is an abuse of discretion.

The Copyright Office's delegated
responsibility and competence is in the
administration of copyright
registrations. It is not, in any sense,
competent to judge copyright
infringement. The Register of
Copyrights is not delegated power to
regulate the bounds of copyright
infringement. Ms. Peter's opinion
should be given no more weight in a
judicial proceeding than the opinion of
any other ordinary, non-party citizen.

6:04 AM

§ 701 · The Copyright Office: General responsibilities and organization²

(a) All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office of the Library of Congress. The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under the Librarian's general direction and supervision.

(b) In addition to the functions and duties set out elsewhere in this chapter, the Register of Copyrights shall perform the following functions:

(1) Advise Congress on national and international issues relating to copyright, other matters arising under this title, and related matters.

(2) Provide information and assistance to Federal departments and agencies and the Judiciary on national and international issues relating to copyright, other matters arising under this title, and related matters.

(3) Participate in meetings of international intergovernmental organizations and meetings with foreign government officials relating to copyright, other matters arising under this title, and related matters, including as a member of United States delegations as authorized by the appropriate Executive branch authority.

(4) Conduct studies and programs regarding copyright, other matters arising under this title, and related matters, the administration of the Copyright

- *Interscope Records v. Duty*, 2006 WL 988086 (D.Ariz.,2006)
- *Universal City Studios Productions LLLP v. Bigwood*, 441 F.Supp.2d 185 (D.Me.,2006)
- *A & M Records, Inc. v. Napster*, 239 F.3d 1004, 1014 (9th Cir.2001) (“Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights.”)

5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA

7 IN RE NAPSTER, INC. COPYRIGHT
8 LITIGATION

No. C MDL-00-1369 MHP

9 This Document Relates To:

10 UMG RECORDINGS, INC. et al.,

11 Plaintiffs,

No. C 04-1166 MHP

12 v.

13 HUMMER WINBLAD VENTURE PARTNERS et al.,

14 Defendants.

15 UMG RECORDINGS, INC. et al.,

16 Plaintiffs,

No. C 04-1351 MHP

17 v.

18 BERTELSMANN AG et al.,

19 Defendants.

20 JERRY LEIBER et al.,

21 Plaintiffs,

No. C 04-1671 MHP

22 v.

23 BERTELSMANN AG et al.,

24 Defendants.

25

Metro-Goldwyn Mayer Studios v. Grokster, Ltd.

454 F.Supp.2d 966 (C.D.Cal.,
September 27, 2006)

Metro-Goldwyn Mayer Studios v. Grokster, Ltd.

454 F. Supp.2d 966 (C.D. Cal., September 27, 2006)

- On remand from Supreme Court.
- Summary judgment granted to plaintiff, finding Streamcast liable for inducement of copyright infringement by users of its P2P software.

MGM v. Grokster

- Supreme Court: “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”
- District court found Streamcast met that standard.

MGM v. Grokster

Streamcast argued plaintiffs must prove that Streamcast:

- (1) for the purpose of inducing infringement
- (2) Took actions beyond distributing infringement-enabling technology
e.g., offering instructions on infringing use
- (3) Which actually resulted in specific instances of infringement.

District Court disagreed:

- Supreme Court said inducement liability can arise where the evidence shows the distributor intends and encourages the product to be used to infringe.
- Hence, no need to prove specific actions beyond distribution.
- Plaintiffs need prove only that Streamcast distributed the product with intent to encourage infringement

MGM v. Grokster

- No dispute that Streamcast distributed infringement-enabling technology.
- Issue: Streamcast's intent.
 - Intent can be shown by evidence of Streamcast's expression or conduct.
 - A patently illegal objective can be inferred from statements and actions.

MGM v. Grokster

Proof of Streamcast's intent:

- Streamcast's software was used overwhelmingly for infringement.
 - A study showed 87.33% of files offered on the Morpheus network – and almost 97% of files actually requested for downloading -- were infringing or highly likely to be infringing.
 - Infringing use by 3rd parties is not by itself evidence of Streamcast's intent, but the “staggering scale of infringement” makes it more likely that Streamcast condoned illegal use, and provides the backdrop against which all of Streamcast's actions must be assessed.”

MGM v. Grokster

Proof of Streamcast's intent:

- Streamcast targeted Napster users, to convert them into Streamcast users by offering them the same file-sharing service Napster had offered.
- Streamcast assisted infringing users
 - Technical assistance to play back copyrighted content that was illegally downloaded.
- Streamcast took steps to ensure that its technology would infringe.
 - Beta testing with copyrighted content, to ensure Morpheus would work with popular content.
 - Search category for “Top 40” songs.
 - Attempted to prevent copyright owners from tracking infringement. (Blocked Media Enforcer; encrypted files).

MGM v. Grokster

Proof of Streamcast's intent:

- Supreme Court said reliance on revenue from infringing use may be evidence of unlawful intent.
- Streamcast's business model depended on massive infringement.
 - Streamcast gave away Morpheus software for free.
 - Earned revenue from advertisements.
 - Needed high-volume use.
 - Increased the number of users by increasing the amount of file-sharing.

MGM v. Grokster

Proof of Streamcast's intent:

- Streamcast took no meaningful affirmative steps to prevent infringement.
 - Supreme Court said that failure to prevent infringing use may indicate an intent to facilitate infringement.
 - Streamcast did not implement a filtering system to block transmission of copyrighted content.
 - Does filtering technology work?
 - Court: Whether or not it does, the fact that Streamcast failed to make some effort to mitigate abusive use of its technology may still support an inference of intent to encourage infringement.
 - More to the point, Streamcast wasn't troubled by the fact that its software was used to commit copyright infringement on a massive scale.
 - Streamcast deployed technological measures to prevent detection of infringement, but deployed no technological measures to prevent infringement itself.
 - Streamcast showed no interest in looking into filtering, which would drive away users.

MGM v. Grokster

- Court rejected Streamcast's claim that it could not be liable for inducing infringement unless it know specifically which copyrighted works were being infringed.
- It is common knowledge that most popular music and movies are copyrighted.

Conclusion:

- No reasonable factfinder can conclude that Streamcast provided OpenNap services and distributed Morpheus without the intent to induce infringement.

